No. 80-1335

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MICHAEL I. SELZER,

Petitioner,

vs.

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in granting a new trial on the ground that the District Court's charge was erroneous in failing to instruct the jury that the

principles set forth by this Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) applied to each defendant individually?

2. Whether this Court's decision in Owen v. City of Independence, 445 U.S. 622 (1980), mandates a judgment against respondent Board of Higher Education?

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STATEMENT OF THE CASE

Respondents strongly disagree with some of the petitioner's characterizations of the pertinent facts. There are numerous instances, as noted by our brief to the Court of Appeals, in which the trial transcript contains conflicting testimony relating to certain occurrences described by petitioner. However, for the purposes of this brief in opposition, and in light of Rule 22 of this Court which states that "a brief in opposition shall be as short as possible," it is unnecessary to counter petitioner's characterization of the facts.*

*On February 5, 1981, the individual defendants and the Board of Higher Education of the City of New York filed a petition for a writ of certiorari seeking to have this Court review the portion of the majority opinion of the Court of Appeals which concluded that Selzer's activity was protected by the First Amendment and therefore Selzer's complaint stated a cause of action. Dkt. No. 80-1332.

REASONS FOR DENYING A WRIT OF CERTIORARI

POINT I

THE PLAINTIFF'S PETITION SHOULD BE DENIED. THE COURT OF APPEALS PROPERLY HELD THAT THIS COURT'S DECISION IN MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION V. DOYLE, 429 U.S. 274 (1977) REQUIRES THAT THE PRINCIPLES OF MT. HEALTHY MUST BE APPLIED TO EACH DEFENDANT INDIVIDUALLY.

The Court of Appeals properly determined that the district court's charge to the jury had failed to apply to each individual defendant the principles established by this Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), in this multi-defendant trial. In holding that this failure by the trial court to question the jury as to whether each individually sued defendant would have voted to deny plaintiff tenure

absent his Central Intelligence Agency (C.I.A.) association required a remand for a new trial, the Court of Appeals stated (629 F. 2d at p. 814):

> "Accordingly, we hold that each defendant should have been given the opportunity to establish by a preponderance of the evidence that absent Seltzer's CIA involvement that defendant would nevertheless have acted in the same way. The failure to charge and interrogate the jury on that point is reversible error."

Petitioner argues to this Court (Petition, pp. 12-19) that the Court of Appeals erred in remanding for a new trial because the district court's interrogatories to the jury adequately met the Mt. Healthy standard. After the jury found that Selzer's association with the C.I.A. was a substantial or motivating factor in the determination to deny him tenure or promotion, and that the defendants had failed to prove that Selzer

would have been denied tenure or promotion even if his association with the C.I.A. had not been considered, the district court asked Interrogatory 3(a) (Petition; Appendix A22). Interrogatory 3(a) stated:

> [W]hich, if any, of the following defendants knowingly acted in such a way as to cause, or contribute to the causation of that result... [A list of the defendants followed.]*

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*Defendants' final proposed Special Interrogatories 1 and 2 were the same as Judge Platt's Interrogatories 1 and 2. By comparison, though, defendants' proposed Special Interrogatories 3-5, concerning plaintiff's denial of tenure, read as follows:

> 3. Which defendant(s) who voted on whether to recommend tenure considered the plaintiff's association with the CIA to be a substantial or motivating factor in the decision to deny Michael Selzer tenure? [A list of defendants followed].

(footnote cont'd. on next page)

That interrogatory did not aid the jury in determining whether any defendant could have been absolved of 42 U.S.C. §1983 liability because such defendant's decision to recommend against Selzer's tenure or promotion would have been made notwithstanding Selzer's protected conduct. Interrogatory 3(a) improperly included any defendant who

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* (footnote cont'd. from previous page)

> 4. Which defendant(s) who considered the plaintiff's association with the CIA as a substantial or motivating factor in the decision to deny the plaintiff tenure, would have reached the same decision even had that defendant not considered the plaintiff's mere association with CIA? [A list of defendants followed].
>
> 5. Was the defendant(s)' decision to recommend denial of tenure for the plaintiff the proximate cause of the plaintiff's denial of tenure? [A list of defendants followed].

would have reached the same decision even had that particular defendant not considered plaintiff's C.I.A. association*. A defendant who acted to deny Selzer tenure or promotion, for any reason, can be said to have "knowingly caused or contributed to the causation of that result." There is no §1983 liability, however, when a defendant acts knowingly, if that defendant would have acted the same way for permissible reasons. If a defendant who considered the C.I.A. as a motivating factor would have also voted to recommend denial of tenure or promotion to Selzer based on Selzer's teaching credentials, then that defendant is not liable under §1983, although he knew he was con-

*Petitioner argues that Interrogatory 3(a) incorporates the principle of Mt. Healthy. To accept petitioner's argument would mean that "result" is synonymous with the word "causation."

tributing to a possible resultant denial of tenure or promotion. In answering the interrogatory 3(a), the jury was not required to determine which defendants, if any, would have acted against Selzer even had those defendants not considered the C.I.A. association.

The propriety of the decision of the Court of Appeals is obvious when reviewing the acts of one of the defendants held liable, Robert Engler. One year prior to Selzer's relationship with the C.I.A. becoming known, Engler voted against recommending him for promotion. Based upon Selzer's file, Engler testified that he did not consider Selzer to be academically qualified for promotion. Similarly a year later, Engler, after having reviewed an almost identical file on Selzer, again voted against recommending promotion for Selzer. Engler

would have most likely voted against Selzer's promotion absent the C.I.A. revelation. But Interrogatory 3(a) was not properly fashioned to allow the jury to consider whether Engler, or any other defendant, would have voted against a recommendation for promotion or tenure notwithstanding the C.I.A. controversy. The Court of Appeals' decision remanding the matter for a new trial is correct and conforms with this Court's decision in Mt. Healthy.

POINT II

THIS COURT'S DECISION IN OWEN V. CITY OF INDEPENDENCE, 445 U.S. 622 (1980), DOES NOT REQUIRE A FINDING AGAINST THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK. THE PETITIONER STIPULATED THAT THERE WAS NO POLICY, PRACTICE OR REGULATION PROMULGATED BY THE BOARD OF HIGHER EDUCATION RELATING TO THE FACULTY MEMBERS ASSOCIATED WITH THE CIA. IN ADDITION, THERE WAS NO EVIDENCE OF SUCH POLICY OR PRACTICE.

The issues raised in Owen v. City of Independence, 445 U.S. 522 (1980), do not arise until there is a finding of liability against a municipality under the standards established in Monell v. Department of Social Services, 436 U.S. 658 (1978).

There has been no finding of liability made against the Board of Higher Education of the City of New York (BHE). In fact, the cause of action for damages against the BHE,

brought pursuant to 42 U.S.C. §1983, was dismissed by the district court. The plaintiff did not appeal the dismissal of this cause of action to the Court of Appeals. Further, petitioner by his attorney stipulated that there was no policy, practice or regulation concerning a faculty member's association with the C.I.A. promulgated by the BHE. See Appendix B at pp. 17-18. Under such circumstances, petitioner cannot establish the necessary elements for relief under Owen and Monell.

Petitioner urges that his failure to appeal the dismissal of the cause of action against the BHE was not fatal because the BHE was later substituted as a party defendant for the purpose of indemnifying the individual defendants. This argument lacks merit.

After the district court's finding of liability against six individual faculty members, the BHE passed a resolution to indemnify the employees involved. This policy consideration is a matter wholly in the BHE's discretion and has never been a subject of the litigation. A stipulation substituting the BHE as the judgment debtor was entered into by the parties to free the individuals from the threat of liens and restraints on their personal holdings. This stipulation, appended to this brief as Appendix A at p. 13, specifies that it in no way impacts on liability or forecloses defenses otherwise available. The stipulation states that it cannot be viewed as a confession of liability. Similar to an insurance policy, indemnity is a contractual relationship and has nothing to do with civil liability.

CONCLUSION

MR. SELZER'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

April 8, 1981.

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel
of the City of New York,
Attorney for Respondents.

LEONARD KOERNER,
RICHARD BOWERS,
PATRICK F.X. MULHEARN,
of Counsel.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL I. SELZER,	:	
Plaintiff,	:	STIPULATION OF SUBSTITUTION OF JUDGMENT DEBTOR
-against-	:	
MORTON BERKOWITZ, et. al.,	:	77 Civ. 1897 (T.C.P.)
Defendants.	:	

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the City University of New York (C.U.N.Y.) is hereby substituted as the judgment debtor in the above-captioned action for the purpose of making payment of any and all judgments, costs, fees and interest which have or may be granted or awarded to plaintiff, Michael Selzer, or to his counsel, Donovan, Leisure, Newton and Irvine, in connection herewith as against any named defendant, under the following terms and conditions:

1. That such substitution in no way effects the assertion of any claim or defense which might be available to any party herein in any further proceeding in this matter;

2. That such substitution is in no way to be construed as an admission of violation of law;

3. That the plaintiff agrees to withdraw forthwith any and all Restraint Notices served or filed pursuant to the New York Civil Practice Laws and Rules;

4. That the plaintiff agrees to vacate the filing of any and all judgments and transcripts or abstracts thereof against the individual defendants in any county of the State of New York, or of any other state, and specifically, agrees to vacate forth-

with any such filings in the counties of New York, Kings and the Bronx;

5. That neither the plaintiff nor his attorneys will demand that CUNY post a supersedeas bond in order to obtain a stay of enforcement of any judgment that has been or may be entered herein, during the pendency of any further proceedings herein;

6. That upon any money judgment in favor of plaintiff or of his attorneys becoming final and unappealable, CUNY will not seek to delay payment beyond the time reasonably necessary to process satisfaction of such judgment; and

7. That under the terms and conditions of this agreement this substitution be made on October 23, 1979 as ratified by the Board

of Trustees of CUNY and so ordered by this Court.

Dated: New York, New York

October 23, 1979

ALLEN G. SCHWARTZ
Corporation Counsel
Attorney for Defendants

BY _____
PATRICK F.X. MULHEARN
Assistant Corporation
Counsel

DONOVAN, LEISURE, NEWTON
and IRVINE
Attorneys for Plaintiff

BY _____
WALTER L. STRATTON
A Member of the Firm

SO ORDERED:

_____
THOMAS C. PLATT, U.S.D.J.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL I. SELZER,	:	
Plaintiff,	:	STIPULATION
-against-	:	Civil Action No. 77 C 1897
MORTON BERKOWITZ, et. al.,	:	
Defendants.	:	

IT IS HEREBY STIPULATED AND AGREED by the parties herein, by their undersigned attorneys, that the following facts are not in dispute:

The defendant members of the Board of Higher Education and Chancellor Robert J. Kibbee took no action implementing or executing a policy statement, ordinance, regulation or decision officially adopted or promulgated by that body's officers with respect to persons who speak to, associate or cooperate with the C.I.A. nor did they

act pursuant to any custom of dealing with persons who speak to, associate or cooperate with the C.I.A. at any time relevant to this action.

ALLEN G. SCHWARTZ
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the City of New York
Attorney for Defendants
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New York, New York 10007

By S/S
Assistant Corporation
Counsel

Donovan Leisure Newton &
Irvine
Attorneys for Plaintiff

By _____
A Member of the Firm